

**NO. 47478-6-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

HARVEY JOHNSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Garold Johnson

No. 14-1-00499-2

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the trial court's order to "forfeit contraband" lawful, where "contraband" may be lawfully forfeited?
2. Is the record insufficient for further appellate review of the trial court's order to "forfeit contraband," where the defendant has not identified what property he seeks to have not forfeited and has not shown that such property was not contraband?

B. STATEMENT OF THE CASE.

1. Procedure

On February 7, 2014, the defendant was charged via information with one count of rape in the second degree. CP 1. On February 26, 2015, a second amended information was filed, charging the defendant with five counts of assault in the third degree with sexual motivation. CP 91-93. That same day, the defendant pled guilty to the charges in the amended information. CP 95-106. On April 9, 2015, the defendant was sentenced. CP 143-57. Paragraph 4.4 of the judgment and sentence indicated, *inter alia*, "forfeit contraband." CP 149.

2. Facts

According to the declaration for determination of probable cause, filed on February 7, 2014, the victim, S.J., was

wait[ing] for the bus at South 74<sup>th</sup> and Cedar Street when an unknown male suspect approached her from behind and pulled her into the nearby wooded area. The suspect physically assaulted her several times during the sexual assault.

...

S.J. was shown a photomontage and identified the defendant as the suspect who raped her.

CP 2.

In the defendant's statement of defendant on plea of guilty, filed on February 26, 2015, he stated:

With regard to Count I: On August 1, 2013, in Pierce County, WA, with criminal negligence, I caused bodily harm accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering to the person of S.J., and I did so for the purpose of my sexual gratification.

With regard to Counts II-V: After having thoroughly reviewed and discussed my case with my attorney, I understand the nature and consequences of this plea bargain, and I'm entering into this plea bargain because I believe it's in my best interest to do so. See *In Re Barr*, 102 Wash.2d 265 (1984).

CP 103.

C. ARGUMENT.

1. THE TRIAL COURT’S ORDER TO “FORFEIT CONTRABAND” WAS LAWFUL, BECAUSE “CONTRABAND” MAY BE LAWFULLY FORFEITED.

The trial court’s order to “forfeit contraband,” rather than “all property,” was lawful because contraband may be lawfully forfeited by a trial court.

The defendant relies primarily on *State v. Roberts*, 185 Wn. App. 94, 339 P.3d 995 (2014). However, *Roberts* dealt with a broader order to forfeit “any items seized by law enforcement,” *Roberts*, 185 Wn. App. at 96, rather than the more limited category of property of “contraband.” The court in *Roberts* relied on *State v. Alaway*, 64 Wn. App. 796, 828 P.2d 591 (1992), for the proposition that “[a] trial court has no inherent power to order forfeiture of property in connection with a criminal conviction.” *Roberts*, 185 Wn. App. at 96 (citing *Alaway*, 64 Wn. App. at 800). In turn, *Alaway* explains:

According to federal authority, a court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute.

*Alaway*, 64 Wn. App. at 798 (citing *United States v. Farrell*, 606 F.2d 1341, 1347 (1979); *United States v. Wright*, 610 F.2d 930, 939 (1979);

*United States v. Wilson*, 540 F.2d 1100, 1101 (1976); and *United States v. Brant*, 684 F.Supp. 421, 423 (1988)) (footnote omitted).

*Alaway* goes on to define the term “contraband”:

“Contraband” has been defined by the United States Supreme Court as “an object, the possession of which, without more, constitutes a crime.”

*Alaway*, 64 Wn. App. at 799 (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S. Ct. 1246, 1250, 14 L. Ed. 2d 170 (1965); and citing *United States v. Farrell*, 606 F.2d 1341, 1344 (1979); and *Davis v. Fowler*, 504 F.Supp. 502, 505 (1980)).

Here, the trial court entered a very limited order that only “contraband” should be forfeited. This order complied with the requirements of *Roberts*, *Alaway*, and the federal cases cited therein. Accordingly, the order of the court was lawful and proper.

2. THE RECORD IS INSUFFICIENT FOR FURTHER APPELLATE REVIEW OF THE TRIAL COURT’S ORDER TO “FORFEIT CONTRABAND,” BECAUSE THE DEFENDANT HAS NOT IDENTIFIED WHAT PROPERTY HE SEEKS TO HAVE NOT FORFEITED AND HAS NOT SHOWN THAT SUCH PROPERTY IS NOT CONTRABAND.

The record is insufficient for further appellate review of the trial court’s order to “forfeit contraband,” because the defendant has not

identified what property he seeks to have not forfeited and has not shown that such property is not contraband.

Defendant does not identify in his brief what property he wishes to have not forfeited. To the extent that “contraband”—the only category of property which was ordered forfeited—is an “object, the possession of which, without more, constitutes a crime,” *Alaway*, 64 Wn. App. at 799, the defendant should not have such contraband returned to his possession. However, without a more definite explanation of what property the defendant thinks was unlawfully forfeited, the record is insufficient for further appellate review.

D. CONCLUSION.


The trial court’s limited order to forfeit only “contraband” was lawful. To the extent the defendant has not identified what property he claims should not have been forfeited as contraband, the record is insufficient for further appellate review.



For these reasons, the state asks the court to deny the defendant's appeal.

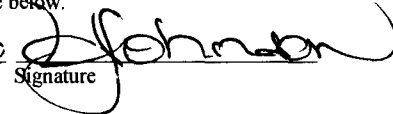
DATED: May 2, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
5/2/16      Date      Signature

## PIERCE COUNTY PROSECUTOR

**May 02, 2016 - 10:33 AM**

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